COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops	)	D.T.E. 03-59

OPPOSITION OF VERIZON MASSACHUSETTS TO MOTION OF DSCI AND INFOHIGHWAY FOR PARTIAL CLARIFICATION AND RECONSDIERATION OF ORDER CLOSING INVESTIGATION

The motion of DSCI Corporation and InfoHighway Communications Corporation ("the CLECs") for partial clarification and reconsideration of the Department's November 24, 2003, *Order Closing Investigation* ("the Order") fails to meet the Department's standard for review, is without merit, and should be denied. Contrary to the CLECs' argument, the Order correctly held that the Department does not have jurisdiction to enforce Verizon Massachusetts' ("Verizon MA") unbundling obligations under 47 U.S.C. Section 271. That holding does not conflict with the Department's acknowledgement that disputes regarding the terms of interconnection agreements are generally arbitrated by state commissions. Thus, no "clarification" is warranted or necessary.

There is also no basis for opening a new docket to address anticipated "post-impairment transition issues," as the CLECs request. As the Department as already found, such a request is premature.

I. The Department's conclusion that it does not have jurisdiction to freeze Verizon MA's rates for Section 271 elements was correct and requires no clarification.

In Section D of the Order, the Department held that freezing Verizon MA's rates for enterprise switching and UNE-P elements at current TELRIC rates, as requested by the CLECs, "is beyond the scope of this proceeding and is unwarranted under Section 271." Order at 18. In reaching this conclusion, the Department correctly found that it "does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271," based on 47 U.S.C. Section 271(d)(6). The CLECs take issue with this holding, claiming that the Department does have jurisdiction because "State commissions are responsible for establishing the rates in interconnection agreements and Verizon must offer Section 271 checklist items in an interconnection agreement." Motion at 7, citation omitted. According to the CLECs, the state would approve a rate "in the context of an interconnection dispute . . . under 47 U.S.C. § 252" and the FCC would merely review that rate. *Id*. at 9.

The CLECs misread the law, however, by failing to distinguish between network elements required to be unbundled under Section 251 and network elements that are required to be provided solely by reason of Section 271. In the case of Section 251 elements, Verizon MA agrees that Section 252(c)(2) empowers state commissions to establish rates. But Section 252 does not apply to obligations imposed solely by Section 271. In the *Triennial Review Order*, the FCC made clear that "… pricing pursuant to section 252 does not apply to network elements that are not required to be unbundled …" by Section 251. *Triennial Review Order* ¶661. The FCC's finding is buttressed by the language of the statute itself. Section 252(c)(2), which the CLECs rely on for the proposition that state commissions may establish rates for all elements (*see* Motion at 8), authorizes the states to establish rates "according to

subsection (d)," but subsection (d) provides pricing standards for network elements required to be unbundled by Section 251 only. *See* 47 U.S.C. § 252(d)(1).

In contrast, Section 271(d)(6) clearly reserves jurisdiction to the FCC to enforce compliance with Section 271 following approval of an application to provide interLATA service, as the Department noted in the Order. As stated by the FCC, "Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *Triennial Review Order*, ¶ 664. (emphasis added).

Thus, the CLECs' reliance on *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) and other law under Section 252 is misplaced. Because Section 252 does not apply to Section 271 obligations, it does not give state commissions jurisdiction to determine pricing for network elements, such as enterprise switching, that need not be unbundled under Section 251.

The absence of such jurisdiction in the Department does not conflict with the Department's allusion (Order at 20) to the role of state commissions in arbitrating disputes under Section 252. The Department identified three independent reasons for declining the CLECs request to freeze Verizon MA's rates for enterprise switching at TELRIC levels. In addition to lack of jurisdiction, the Department held that such a freeze would be "unwarranted under the Department's own authority to regulate intrastate common carrier services." Order at 19. As a third ground, the Department noted that the *Triennial Review Order* set up a transitional framework for the parties to negotiate modifications to their interconnection agreements, and that it would be premature for the Department to review such agreements before the parties had even attempted to negotiate any required changes. *Id*. at 19-20. Each of these three grounds is

sufficient unto itself for rejecting the CLECs' attempt to preserve TELRIC rates in the face of the FCC's finding that such rates no longer apply to enterprise switching. Thus, the import of the carryover paragraph on pages 19 to 20 of the Order is that, *even if* the Department had jurisdiction over the pricing of Section 271 elements such as enterprise switching, and *even if* a freeze at TELRIC rates could possibly be justified under the Department's own authority, imposing such a freeze before the parties had even attempted to negotiate new rates would *still* be premature.[1]

In short, the CLECs have failed completely to meet the Department's standard for reviewing an order. They do not establish any error in the Department's ruling or ambiguity requiring clarification. Indeed, their entire claim is based on a mistaken reading of the law that is at odds with the unambiguous finding of the FCC in the *Triennial Review Order* that it – not state commissions – will review terms relating to the provision of Section 271 elements. Accordingly, the CLECs' motion should be denied.

II. The CLECs have offered no grounds for opening a new docket to address anticipated transition issues with respect to enterprise switching.

Under the guise of a motion for "reconsideration," the CLECs move the Department to open a new docket to "address post-impairment transition issues" (Motion at 10), but they fail to identify any such issues that are ripe for determination and fall within the Department's jurisdiction. They choose instead to allege generally that the parties "have significant differences of opinion regarding Verizon's obligations under the TRO post-impairment." *Id*. at 11. Such generalities offer no basis for opening a new docket.

[1] Moreover, the Department specifically limited the scope of its implication that an arbitration under Section 252 might include a dispute over rates for Section 271 elements, as applying only "to the extent that the carriers must renegotiate terms of their interconnection agreements …" Order at 19. Verizon MA does not agree that it must include rates and terms for Section 271 elements in its interconnection agreements.

The sole concrete issue the CLECs raise is their old complaint that Verizon MA has failed to develop a hot cut process for DS-1 loops, coupled with speculation of the dire consequences that "might" result. *Id*. The CLECs do not, however, argue that Verizon MA has any obligation to perform hot cuts, nor do they contest the FCC's finding that lack of a hot cut process for DS-1 loops is not evidence of impairment where the incumbent LEC, such as Verizon MA, migrates customers by providing parallel digital loops. *See* Order, at 16-17. The CLECs' speculation that such parallel provisioning "might" result in service outages hardly justifies the Department opening a new docket at this time.

Conclusion

For these reasons, the Department should deny the CLECs' motion for partial clarification and reconsideration.

Respectfully submitted,

VERIZON MASSACHUSETTS

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